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A HISTORIC JUDICIAL CONTROVERSY AND SOME REFLECTIONS SUGGESTED BY IT.[1]

PROBABLY most well informed persons of the present generation associate the notion, once maintained, that a state might secede or nullify an act of Congress, with the South and its earlier statesmen. And it is true that the resolutions drawn substantially by Jefferson and adopted by the Legislature of Kentucky in 1798, and similar resolutions drafted by Madison and adopted by the General Assembly of Virginia in the same year, together with some similar and more explicit declarations by the Legislature of the former state in 1799, seem to furnish some warrant for this impression.

Yet it seems to be well authenticated that the first real efforts to secede were made in New England; while the first formal and definite effort at nullification under solemn judicial sanction was made by the State of Wisconsin in the historic controversy to which I shall, on this occasion, particularly refer.

The first attempt at secession arose in consequence of the Louisiana Purchase. It was contended by the leaders in this movement that the annexation of Louisiana created, in fact, a new confederacy to which the states were not bound; that it was oppressive to the interests and destructive of the influence of the northern section, whose right, and, indeed, duty, it was to secede.

It was said that as a result the evil of slave representation would be aggravated and the Union itself be endangered by this expansion of its territory and weakening of its line of defense against invasion. A Northern confederacy was planned by the Federalist leaders in New England. Among those involved was Timothy Pickering of Massachusetts. He had been Post-master General, Secretary of

[1] An address delivered before the Indiana State Bar Association at its meeting of July 11, 1912.

War and Secretary of State, and was then a Senator of the United States. One of his associates was Roger Griswold of Connecticut, a member of Congress from that state, and afterwards a Justice of the Supreme Court and Governor. Another was William Plumer of New Hampshire, though born in Massachusetts, then in the Senate of the United States and afterwards twice Governor of his state.

It is said that Alexander Hamilton was selected as the person to conduct the military operations which were contemplated; and that, though he was opposed to this meditated treason, he consented to attend a meeting of Federalists to be held in Boston during the autumn of 1804. His tragic death in July of that year prevented any participation in these conferences.

Apparently, the purpose of the conspirators was soon abandoned, and no overt act was committed; but it is well to remember that Massachusetts and not South Carolina was the original home of the secession heresy. However, in this connection, it may also well be remembered that her most distinguished son, Daniel Webster, in perhaps the greatest parliamentary debate recorded in history, absolutely demolished this doctrine in his celebrated reply to Robert Y. Hayne of South Carolina. This, in a measure, atones for this error on the part of Massachusetts, as well as for the exhibition of her weakness in choosing some of Mr. Webster's successors in the Senate. In respect of senatorial representation she has not had, at times, much advantage over Illinois.

The case in Wisconsin in which the right of a state to nullify Federal legislation was judicially determined is referred to generally as the Glover rescue case or the Booth case. In writing of it I avail myself of the labors of that most excellent and accomplished Judge, JOHN B. WINSLOW, Chief Justice of the Supreme Court of Wisconsin, who in some way finds time not merely, with great fidelity and general acceptance, to perform the arduous duties of his high office, but also, in most interesting and attractive style, to contribute to the judicial and professional history of his state.

In the spring of 1852, while the great conflict over slavery which preceded the Civil War was at its height, a negro slave named Joshua Glover ran away from his master, Benammi S. Garland, who resided in Missouri near the city of St. Louis. Glover ultimately reached Racine and found work about four miles from that city in a mill. There he remained until the spring of 1854, when his master, having discovered his whereabouts, came to Wisconsin to reclaim him under the Fugitive Slave law of 1850. Following the procedure indicated by that statute, he made a complaint before Winfield Smith, then a United States Court Commissioner, at Milwau-

kee, and afterwards one of the leading lawyers of that city. I remember him well in later years; a man of medium height, with no little energy of manner, speaking in an earnest, florid and rhetorical style and with much fluency.

Mr. Smith issued a warrant for the arrest of Glover, and a deputy marshal, with the slave owner and such assistance as he deemed necessary, proceeded to Racine, forcibly entered the little cabin where Glover lived, knocked him down, and carried him, bound and handcuffed, in a wagon to Milwaukee, where he was lodged in jail.

This proceeding created great excitement in Racine as soon as it became known; a public meeting in the court-house was called, and Saturday morning, March 11th, the bell in that edifice rang loudly to summon the freemen of that little community to a new struggle for liberty.

The people gathered in great numbers; impassioned addresses were made and fiery resolutions were adopted. By these resolutions the arrest of Glover was denounced as an outrage and his trial by a jury was demanded; it was also resolved that the citizens of Racine would go in person to secure his release; and that, "as the Senate of the United States has repealed all compromises heretofore adopted by Congress, we, as citizens of Wisconsin, are justified in declaring, and do hereby declare, the slave catching law of 1850 disgraceful and also repealed."

A committee of one hundred was appointed to see that the resolutions were carried out, and the committee took steamboat for Milwaukee in the afternoon of that day.

The news of Glover's arrest had reached Milwaukee early in the morning by telegraph. At that time Sherman M. Booth had lived in Milwaukee about six years, having come there from Connecticut where he had carried on an active propaganda for the abolition of slavery. He was, as earnest men are apt to be in a great cause, zealous to the point of fanaticism. He had purchased an interest in an anti-slavery paper on coming to Milwaukee, and became its editor, and in it insisted, in season and out of season, that slavery must be abolished. I never knew him but I remember seeing him and hearing him speak when he was an old man, and noting then his power of invective and biting sarcasm. When he heard of Glover's arrest he at once consulted with General James H. Paine, then a prominent lawyer, who, with his son Byron, then about twenty-six years of age, was practicing in Milwaukee. On their advice a writ of *habeas corpus ad subjiciendum* was sued out before Judge Charles E. Jenkins of the County Court of Milwaukee Coun-

ty, directed to the Federal Marshal who had the custody of Glover, and the sheriff of the county. These officers very properly, as we now know, refused to produce the prisoner in obedience to the writ, as he was held under Federal process and hence the jurisdiction of the tribunals of the nation was exclusive.

When the fact of this refusal became public there was great excitement throughout the city; a great meeting was held in the court-house square in the afternoon, at which highly inflammatory speeches were made, with the result that finally, about six o'clock in the evening of the same day, that is, Saturday, the day after the arrest, the crowd broke into the jail and rescued Glover.

I am glad to say that he was never recaptured. What became of him I do not know; and he entirely disappears from our history, though the subsequent litigation which arose out of the incidents narrated was, for many years, often referred to as the Glover rescue case.

A graphic account of the rescue appeared in the Racine *Advocate* of March 20th in that year. From that article the following extract may not be uninteresting:—

> "A committee of twenty-five of the citizens of Milwaukee was appointed a committee of vigilance and protection. A committee of two was also appointed to wait upon the sheriff to see if he still persisted in refusing to serve the writ. This refusal being persisted in, measures were immediately taken to see what steps were necessary to see that the 'Republic received no detriment' and that the laws of the land were enforced. The citizens of Milwaukee, on this notice being given, assembled to the number of five thousand in the court house square, where they were addressed by the most eloquent and influential members of the Milwaukee bar. The excitement continued, and spread to all parts of the city. At five o'clock the delegation from this city arrived at Milwaukee and were escorted to the court house square, where the citizens of Milwaukee were listening to addresses upon the subject matter. The military had been ordered out, but did not appear on the streets. At six o'clock the friends of law and order came to the conclusion that it would be unsafe as well as eminently wicked for a human being to be locked up in a jail over the Sabbath against whom no crime had been alleged; accordingly a courier was dispatched for a team, and as the court house bell rang the tocsin of liberty the writ of 'open sesame' was enforced, while the glorious sun sank

> smilingly in the west as he shed his rays upon the spires of Milwaukee for the 11th day of March, 1854; a glorious prelude to the coming day of rest. The doors of the prison shook as though another Peter were within, and the willing cell yielded up its victim to the fresh light and air of God's glorious earth. The negro waved his hat as he mounted the wagon in return to the waving of hats and joyous shouts which arose from that vast crowd of freemen who said that the Milwaukee jail could not be used for the confinement of men who had committed no crime."

It is significant that this lawless but humane mob was "addressed by the most eloquent and influential members of the Milwaukee bar." What the tenor of those addresses was does not appear; but what followed would indicate that these eminent lawyers had appealed to the feelings rather than to the sound judgment and law-abiding spirit of their listeners. Booth many years afterwards in a public address recited his part in this lawlessness. He then said:

> "In riding through the streets of Milwaukee to call a public meeting, I did not cry as was reported and sworn to, 'Freemen to the rescue!' A forcible rescue was never my purpose; I aimed simply to secure for Glover a fair trial and competent counsel, and in calling the meeting I used but two forms of speech, viz: 'All Freemen,' or 'All citizens who are opposed to being made slaves or slave catchers turn out to a meeting in the court house square at two o'clock,' the only variation being that I sometimes used the word 'men' and sometimes the word 'citizens.' * * * The immediate cause of the rescue was the speech and report of C. K. Watkins, chairman of the committee to wait on Judge Miller and inquire if the writ of liberty would be obeyed. He reported that Judge Miller said, 'No power on earth could take him from his jurisdiction.' He (Watkins) expatiated on the tyranny of the judge and the hardship of imprisoning Glover over the Sabbath; I had invited the Racine delegation to meet our committee at the American House for consultation and was about to start when I heard a shout and saw a rush for the jail and anticipated the result. I went up to Dr. Wolcott and Byron Paine, standing on the court house steps, and said to them as the crowd was bringing Glover out, that I regretted the act, that it was a bad precedent and the people would not discriminate between this case and one in which a prisoner was rightfully held. To personal appeals of Dem-

> ocrats before the first meeting was opened, 'Mr. Booth, let us take him out,' I answered, 'No, we must use legal and peaceful methods,' and during the whole of this scene I counselled against violence, publicly and privately. Yet in all the histories of this case, in newspapers, pamphlets and books, I am represented as riding through the streets of Milwaukee shouting, 'Freemen to the rescue.' * * * I respectfully decline the honor of a deed I never performed. The only responsibility attaching to me for the rescue of Glover is that I helped create a strong public sentiment against the fugitive slave act and called the meeting to protect the legal rights of Glover and give him a fair trial. If, when assembled for peaceable and lawful purposes, the course of the judge and his bailiffs excited the people to take Glover out of jail against my advice, I was guiltless of the rescue."

The Judge Miller referred to was Andrew G. Miller, District Judge of the United States for the District of Wisconsin.

I am inclined to think that the general impression as to Mr. Booth's participation in this affair hardly accords with this statement. Certain it is, as will hereafter appear, that he was indicted, convicted and sentenced under the Fugitive Slave law for having aided and abetted the escape of Glover.

He was first arrested on a warrant issued by a United States Court Commissioner at Milwaukee, and bound over to the next term of the Federal Court. Thereafter his bondsman surrendered him and, by warrant dated May 26th, 1854, the Commissioner committed him to the custody of the Marshal. Thereupon application was made to Hon. Abram D. Smith, then a Justice of the Supreme Court of Wisconsin, for a writ of *habeas corpus* to bring Booth before him. Judge Smith allowed the writ directed to the Marshal. That officer returned the warrant of the Court Commissioner as the justification for the detention of the prisoner.

The cause was argued by Byron Paine for the prisoner and for the Marshal by Mr. J. R. Sharpstein, Federal District Attorney.

The court discharged the prisoner, holding the Fugitive Slave law of 1850 to be unconstituional, on the ground that Congress had no power to legislate on the subject; that Section 2 of Article IV of the Constitution which declares that "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due," was a mandate

to the states and not a grant to Congress of the right to legislate for its enforcement. The court also held the warrant fatally defective and the law of 1850 invalid in denying trial by jury and also not requiring due process of law.

This decision was in palpable conflict with the law declared by the Supreme Court of the United States in *Prigg* v. *Pennsylvania*.[2] But it was universally acclaimed by the foes of slavery in Wisconsin as the opinion of a very Daniel come to judgment. The opinion was eloquent and plausible and showed some learning and reflection.

The citizens of Racine again assembled and concurred unanimously in the following resolutions:—

> "RESOLVED, That we hail with unmingled satisfaction the decision of Judge Smith by which the constitution is vindicated and restored to its original purity;
>
> "RESOLVED, That Judge Smith's construction is the true and undoubted meaning of the constitution as left by the hands of the fathers who framed it, that the reasoning by which he arrived at that conclusion is unanswerable and places the Judge in the front rank of constitutional jurists;
>
> "RESOLVED, That it is "holy light" when compared with the muddy and discrepant opinions of the United States Court in the famous Prigg case, reported in 16th Peters;
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> * * *
>
> RESOLVED, That with him we sincerely and solemnly believe that the last hope of a free representative and republican government rests upon the *state sovereignties* and fidelity of state officers to their double allegiance to the state and federal government;
>
> RESOLVED, That Judge Smith has manfully and ably fulfilled the trust of double allegiance which the people of Wisconsin committed to him."

Everywhere throughout the state among the friends of liberty this decision was received with great enthusiasm.

Thereupon certiorari was sued out and the case taken to the Supreme Court. Here it was argued in June, 1854, by Paine for Booth and by the federal attorney with Edward G. Ryan for the govenrment. I remember Byron Paine well; a tall, well-built man, with a big head, a high forehead verging on baldness, large features, a florid complexion and thick wavy brown beard. He was fond

[2] 16 Pet. 640, 539.

of out-door life, especially of hunting, and seemed to have abounding physicial and mental vitality and energy.

This was a great case, involving profound constitutional and governmental questions; and he made a great argument. But twenty-six years of age, he spoke with all the fiery eloquence of youth and the deep earnestness of sincere conviction.

I cannot make any extracts from his argument; but one thing I must quote; and that is the most impressive tribute to trial by jury to be found in the English language. The young advocate was contending that the poor, hunted negro, claimed as a slave, had a right to trial by jury as to his right to liberty—and that in all times and in all ages this was the great safeguard against tryanny and oppression. And this is what he said:—

> "As the ark of the covenant containing the testimonies of God was borne by the twelve, chosen by the twelve tribes of Israel, from the wilderness onward to the land of promise, and as the waters divided before it and allowed the people to pass through dry shod; so has the trial by jury, the ark of the covenant containing the testimonies of liberty, been borne by the twelve onward from remote ages of barbarism to the present advanced state of civilization; and so during all that toilsome march, the waves of tyranny have divided before it and allowed the people to pass through unscathed.

These are noble words; and they are just as true today as they were when spoken, over fifty years ago.

Ryan, who appeared for the government, was of an entirely different type. He was afterwards Chief Justice of the Supreme Court of his state, and one of the ablest and most learned lawyers who ever sat on any court in this country. Payne was a radical; Ryan a conservative. Each felt the utmost confidence in his own position; in each there was something of intellectual arrogance such as goes with conspicuous abilities and strong character.

Ryan was a striking looking man, rather tall, fairly heavy, with an enormous head and prominent eyes that gave him a peculiar appearance. He was a man of most violent temper. When I have seen him sitting on the bench, with his head inclined forward and slightly lowered, and his eyes bulging with interest and excitement, I have been forcibly reminded of some great taurine creature just about to charge upon his victim.

I do not mean to indicate that he was guilty of outbreaks of temper on the bench—I do not think he was; but knowing the violence of his disposition, his appearance made this impression on me. Possibly

his judicial style somewhat lacked a kind of chaste simplicity which is quite desirable. But, subject to this criticism, he was, in my judgment, the greatest master of Judicial English of whom I have ever had any knowledge.

So there were great arguments in this case. Great arguments make great opinions.

The Supreme Court affirmed the decision of Judge Smith, one of the three judges dissenting as to the opinion that the law of 1850 was unconstitutional, but concurring in the result on the ground that the process under which the relator was detained was insufficient.

This triumph for freedom was universally acclaimed throughout the United States. Charles Sumner wrote to Paine, under date of August 5th, saying, among other things:—

> "I congratulate you upon your magnificent effort which does honor not only to your state but to your country; that argument will live in the history of this controversy. God grant that Wisconsin may not fail to protect her own right and the rights of her citizens in the emergency now before her. To her belongs the lead which Massachusetts should have taken."

Wendell Phillips wrote him under date of November 24th:—

> "I hoped to have met you last evening to tell you with what unbounded delight I read your argument in the Booth case. You know you have many companions in the pathway of that effort; but I think none excels you in the completeness and force with which the points are presented and some of the views with which you sustain points made by others are strikingly original."

These were indeed stirring times; the great struggle for freedom was on; even then the dark clouds of civil and titanic war hung low in the horizon over our devoted country.

In July 1854 Booth and another, being indicted in the Federal District Court for violation of the law of 1850 in aiding Glover to escape, applied for *habeas corpus* to the Supreme Court of the State. The application was denied on the ground that the Federal Court had acquired jurisdiction and, the petitioners being held by lawful process, another court could not interfere.

After they had been tried and convicted the Supreme Court, on similar application, discharged them on the same grounds as those relied on in the first case, except that there was no question then as to the form of the process and, of course, no room for the

suggestion that the right to issue it could not be lawfully delegated to a Court Commissioner.[3]

This is really the height of legal absurdity; a party indicted under a statute which the court applied to holds to be unconstitutional is denied *habeas corpus* out of comity to the court into which the indictment is returned; and then, after conviction, is discharged on the ground that the law under which the conviction was procured is unconstitutional.

This seems preposterous to us now. But the ground on which the State Court proceeded in its final decision was that where a person is convicted under an unconstitutional statute, the judgment is void for want of jurisdiction. The court did not perceive the limitation, essential to the independance of federal authority, and now universally recognized, that where a person is in custody under federal process, the courts of the nation have a jurisdiction which is exclusive.

Writs of error were issued from the Supreme Court of the United States to reverse these two judgments; the first in October, 1854, to which due return was made; the second in June, 1855, to which the State Court directed its clerk to make no return, having by that time reached the conclusion that the Supreme Court of the United States had no appellate jurisdiction in the premises, and that the act of Congress purporting to confer it was unconstitutional. The Federal Supreme Court reversed both of these judgments.[4]

It was argued for the government by that great lawyer, Jeremiah S. Black, then Attorney General of the United States. No counsel appeared for Booth, though he is said to have sent to the court a pamphlet copy of Paine's argument below and copies of the opinions of the Justices of the Wisconsin court.

The opinion was delivered by Chief Justice, Roger Brooke Taney, of Maryland. He had been appointed to this exalted position by President Jackson. The latter, in 1833, desired to secure the removal of the deposits of government moneys from the Bank of the United States. Taney was then Attorney General, and concurred in the President's views. William J. Duane, of Philadelphia, was Secretary of the Treasury. He declined to remove the deposits, the President dismissed him from the cabinet, and on the same day, September 23rd, 1833, appointed Taney in his place. The latter, three days later, made the necessary order. The Senate promptly

[3] In re Booth, 3 Wis. 1, 49; Ex parte Booth, 3 Wis. 145; In re Booth and Rycraft, 3 Wis. 157.

[4] Ableman v. Booth, 21 How. 506.

rejected Taney's nomination, which the President held back as long as possible; and in 1835 also rejected or ignored his nomination to be Associate Justice of the Supreme Court.

Shortly thereafter John Marshall died; and on March 15th, 1836 Taney was appointed his successor, and, as the complexion of the Senate had changed, was duly confirmed.

Shortly prior to the Booth case Taney had written the principal opinion in the Dred Scott case. His appointment was certainly a political appointment. The decision in the Dred Scott case was obviously wrong on the merits and probably so on the technical or jurisdictional question involved; and from these circumstances Taney's fame as a judge suffered. But he was really an accomplished lawyer and an excellent, possibly a great, Judge. At the time the Booth case was decided, 1859, he was an old man, some eighty-two years of age. He died October 12th, 1864, at the age of eighty-seven.

Yet the opinion in the case under consideration shows no evidence of waning mental power. It is clear, logical and convincing. After a detailed statement of the facts, the Chief Justice points out that in one case the State Court claimed to exercise jurisdiction to supervise and annul the proceedings of a Federal Commissioner acting under national authority; and in the other, to exercise a summary jurisdiction of the same character over the judgment of a Federal District Court, adjudging a defendant guilty of an offense against the laws of the United States; and adds that the State Court also held that its decision is final and conclusive and not reviewable in the Courts of the United States.

He then remarks:

> "These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State Courts over the courts of the United States, in cases arising under the constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a state."

After further discussion, he says:

> "It would seem to be hardly necessary to do more than to state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the high

> trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found."

After an elaborate and lucid exposition of the nature and importance of the appellate jurisdiction of the Supreme Court of the United States, he expresses his view of the gravity of the case in these words:

> "We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the Supreme Judicial Tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead."

He concluded by declaring the Fugitive Slave law to be constitutional in all is provisions.

Thereafter, the United States attorney asked in the Supreme Court of Wisconsin that the mandates in these cases be filed. The judges of that court who heard the cases were none of them on the bench; and Byron Paine, counsel for Booth, was one of the new judges and, of course, disqualified. The other two judges divided in opinion, and hence, as no order allowing these motions could be made, they were denied.

In February following Booth was arrested on a warrant issued on the judgment against him, and again applied to the Supreme Court of Wisconsin for *habeas corpus*. Judge PAINE was, of course, disqualified in this case; and the other two judges, differing, as indicated, no order could be made and the writ was refused. President Buchanan afterwards pardoned Booth.

This recital demonstrates how completely the Supreme Court of a state attempted to nullify and defy Federal authority.

To complete the picture, it should be also stated that when the decision of the Supreme Court at Washington was announced, the Legislature of Wisconsin adopted the following resolutions:—

> "WHEREAS, The Supreme Court of the United States has assumed appellate jurisdiction in the matter of the petition of S. M. Booth for a writ of *habeas corpus*, * * * and

WHEREAS, Such assumption of power and authority by the Supreme Court of the United States to become the final arbiter of the liberty of the citizens and to override and nullify the judgment of the State Courts declarative thereof is in distinct conflict with that provision of the Constitution of the United States which secures to the people the benefit of the writ of *habeas corpus;* therefore,

Resolved, (the Senate concurring), That we regard the action of the Supreme Court of the United States in assuming jurisdiction in the case before mentioned as an arbitrary act of power unauthorized by the Constitution and virtually superseding the benefit of the writ of *habeas corpus* and prostrating the rights and liberties of the people at the foot of an unlimited power.

Resolved, That this assumption of jurisdiction by the federal judiciary in the said case and without process is an act of undelegated power and therefore without authority and void and of no force;

Resolved, That the government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress.

Resolved, That the principle and construction contended for by the party which now rules in the councils of the nation that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism; since the *discretion* of those who administer the government, and not the *constitution* would be the measure of their powers; that the *several states* which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction, and that a *positive* defiance by these sovereignties of all unauthorized acts done or attempted to be done under color of that instrument is the right remedy."

The Governor promptly approved these resolutions; so that all the departments of the state government were thoroughly committed to this attitude of hostility to and defiance of the Federal Government. This is, indeed, a singular chapter in our country's history.

A word may be said as to two of the principal figures in this episode. Judge SMITH, who granted the first application of Booth, was a Democrat. One would suppose that his party would stand by him in this extreme assertion of state sovereignty, a cardinal doctrine of Democratic faith. Perhaps this might have been so on an abstract question. But in the conflicts of life there are no abstract questions. Men seldom reason logically or clearly where their feelings are involved. The Democratic party was really a pro-slavery party. So in Wisconsin they sacrificed Judge SMITH; and when his term expired, nominated another candidate. The brilliant young advocate, whose eloquent appeal had so swayed the court, was nominated by the Republicans and, after a bitter contest, elected on this issue. Carl Schurz campaigned for him, and on one occasion closed an impassioned address as follows:—

> "Our poor state has suffered much, its credit is ruined, its prosperity blighted, its political honor has been forfeited by wholesale corruption and maladministration. There is almost nothing to be proud of but the gallant independence of our Supreme Court and the spirit of liberty which caused the people to sustain them. Will you sacrifice that also? Will you suffer the enemies of your liberties to nestle in your own citadel? Will you see Judge Miller's opinions and pretensions infest the highest court of this state? (Cries of no! never!) Will you see the dirty fingermarks of Buchanan's administration on the Supreme Bench of Wisconsin? If not, place a man there who dares to be himself. Let the friends of liberty and self-government present an unbroken front. Their banner bears the inscription, 'State rights and Byron Paine."

And so the people of the state elected Byron Paine and really indorsed the attitude of their public servants.

I digress long enough to say that Judge Paine made a brilliant and able judge. He resigned in 1864 to enter the Union army, returned to practice after the war, was appointed to the Supreme Court September 10th, 1867, and served until his death, January 13th, 1871, at the age of 43. The court as then constituted, consisting of Luther S. Dixon, Chief Justice, and Orsamus Cole and Byron Paine, Associates, was the court as I first remember it. It was a strong and able court and enjoyed, in a high degree, the confidence of the Bar and the people of the state.

In reflecting on this historic case, it seems strange that the judicial leader in this forensic rebellion against national authority for-

sook his party in this great controversy. It also is worthy of comment that the judge who wrote the opinion demolishing these extreme pretensions was of the same party; the party in which state sovereignty was one of the popular battle cries. Yet in that opinion Taney made a vigorous assertion of national power which would have done credit to John Marshall. But Smith was from a free state; Taney from a slave state.

This controversy was, after all, an incident in that great struggle for human freedom which then engaged the nation, and which, after the widest discussion in the forum, in legislative halls, on the platform and before the people, could only be settled by the sword. Already the dark clouds of civil discord were lowering over our devoted land. At last the storm broke; and our country paid in the awful toll of death and suffering, in the loss, not merely of countless treasure, but of her best and bravest, North and South, the fearful penalty of a nation's sin.

Well do I remember those stirring times now fast receding into the comparative twilight of history. Yet they endure in the vivid light of reality in the memory of those who lived through them. And as we recall the awful burdens of death, of desolation and suffering by which this nation expiated her great sin, almost unpardonable, one commanding figure rises before us, and we hear again the mournful cadence of his voice as, so soon to fall a martyr in the cause to which his life was consecrated, he uttered these simple yet majestic words:—

> "If we shall suppose that American slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives, both North and South, this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet if God wills that it continue till all the wealth piled by the bondsman's 250 years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said 3,000 years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether'."

But government by the people was not to perish from the earth. The mighty scourge passed away; and there emerged from this

titanic and awful struggle a recreated nation, consecrated and dedicated anew to the ideal of liberty and equality before the law.

To attribute the growth and expansion of national power wholly to the Civil War and its effects, would be to pursue a false philosophy. Before the war those unifying influences, now so fully developed, by which transportation and free communication have been so marvelously increased since the foundation of our government, had begun to operate. We are now one people in a sense that was not only physically impossible, but mentally inconceivable, when the Federal Constitution was adopted. It is an impressive and overwhelming fact that our population, then but three millions, has increased to ninety millions. It is, however, of more significance in this connection that our great metropolis now has a population more than fifty per cent in excess of that of the thirteen original states; while the time occupied to travel from that metropolis to the Golden Gate of the Pacific hardly exceeds that occupied by Thomas Jefferson in his journeys from Monticello to Washington; and communication between nearly all parts of our extensive domain by the miracle of electricity has become practically instantaneous. Every day the incidents of national import are, by the wonderful agencies of the press, gathered up and simultaneously communicated to all our people.

In all matters of National sovereignty, state lines are vanishing lines; and without objection and, indeed, almost without comment, powers are now exercised by the General Government which would never have been even hinted at fifty years ago. Yet, if the opinions of John Marshall, that profound and far-sighted statesman and jurist, are examined, there will be found, clearly enunciated, those fundamental principles of organic law, which amply justify the most extensive modern claims of Federal authority. Indeed, all that can be justly conceded to the New Nationalism is plainly expressed in these memorable words, found in his opinion in *Gibbons* v. *Ogden*,[5] where he was discussing the Commerce Clause of the Constitution:—

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific ob-

[5] 9 Wheat. 1.

> jects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

This is the corner-stone of the New Nationalism. The Federal government in the exercise of all the extensive powers granted to it, is restrained only by the express limitations of the Federal Constitution. As to these powers there are no states. The National government and its agencies deal directly with the people of the Union.

This idea has been slowly developed and is capable of much wider application in legislation and administration than has yet been attempted. I perceive no reasonable objection under the Constitution to legislation requiring of all engaged in commerce between the states a license from Federal authority, with such requirements in respect of conditions under which such license is to be granted as Congress may think it proper to exact.

It is difficult to set any limits to this plenary authority of the nation. If the Congress shall deem it expedient to undertake the colossal task of providing, by administrative commission, similar to the Interstate Commerce Commission, for the regulation of all interstate and foreign commerce, including the control of prices, he will be a bold man who challenges the constitutional validity of such an effort, whatever may be said as to its wisdom.

Nations, like indivduals, have a certain organic growth and development. In this country for fifty years there has been a constant growth of National power at the expense of that of the state. *Nulla vestigia retrorsum.* It has been an evolutionary process, due to changing conditions in our national life, before the realities of which, academic theories of government have been compelled to yield. This is not to say that the Constitution has been evaded. It has been rather construed in the light of changed conditions and altered circumstances.

This is not an indication of retrogression or atrophy, but rather of healthy growth and development. Progress is the essential condition of vigorous life either individual or social.

So this tendency will continue, not to the destruction of local self-government, but to the just development of National strength and power.

We have our troubles in the body politic; yet, after all, even in

this restless age, grave as they seem, they are acute and temporary and not organic.

Let us not despair of the Republic. Let us look forward with hope and confidence to her glorious future and imperial destiny. Let us all strive to do our part to secure its accomplishment. Let us cherish that simple, old-fashioned faith in ourselves and our country, through all our national struggles and trials, which our past history so amply justifies.

Let us never forget that great material prosperity, the glory of conquest and all the bright and glittering panoply of national power, can not take the place of those higher essentials which sustain and develop individual and national character. These qualities, honesty, steadfastness, frugality, temperance, courage, loyalty, industry and perseverance, homely virtues though they be, established our national character and made us what we are. They are still our birthright and our best possession.

Someway, as in thinking and writing of those days long ago, when, as a boy, I was deriving my first impressions, my mind recurs to those simple, almost rustic, ideas of government and national life which then obtained. We were not a great world power; we had no really great city and no great fortunes. We were largely a rural people, possibly, as Bernard Shaw describes us today, somewhat a nation of villagers. Class distinctions were not marked; gross abuses in government were rare; corruption in public affairs almost unknown; and an optimism untried by the national tragedy so soon to follow was universal.

The mutterings of the storm were heard but their ominous portent was disregarded. "They jest at scars that never felt a wound." But still, though we have had our struggles, ours has been the victory; and we are stronger, wiser, yes, and I believe better, for them.

And so my mind turns to those lines, so familiar long ago, expressing the hopeful and patriotic sentiment of that older time as well they may that of our own:—

"Thou, too, sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate!
We know what Master laid thy keel,
What Workmen wrought thy ribs of steel,
Who made each mast, and sail, and rope,
What anvils rang, what hammers beat,

In what a forge and what a heat
Were shaped the anchors of thy hope!
Fear not each sudden sound and shock,
'Tis of the wave and not the rock;
'Tis but the flapping of the sail,
And not a rent made by the gale!
In spite of rock and tempest's roar,
In spite of false lights on the shore,
Sail on, nor fear to breast the sea!
Our hearts, our hopes, are all with thee,
Our hearts, our hopes, our prayers, our tears,
Our faith triumphant o'er our fears,
Are all with thee,—are all with thee."

S. S. GREGORY.

CHICAGO.